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Brenda J. Marshall v. O. Stewart Pierce : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

BRENDA J. MARSHALL,

Plaintiff and Appellant,

vs.

O. STEWART PIERCE,

Defendant and Appellee.

Case No. 20040457- CA

REPLY BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH
HONORABLE ANTHONY B. QUINN, JUDGE

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Plaintiff and appellant makes the following reply to Appellee's Brief:

ARGUMENT

POINT 1. THE CLEAR WEIGHT OF THE EVIDENCE IN THIS CASE IS THAT PLAINTIFF'S INJURIES AND DISABILITY RESULTING FROM THE AUTOMOBILE COLLISION WERE PERMANENT.

A. DEFENDANT WAIVED ANY OBJECTION THAT PLAINTIFF DID NOT MEET THE THRESHOLD REQUIREMENTS OF SECTION 31A-22-309(1)(a)(iii) or (v).

In this case the jury was asked to determine if defendant was negligent, and if this negligence was the proximate cause of plaintiff's injuries. The jury answered yes as to both. If plaintiff's evidence did not meet the threshhold requirements, then the case should not have been submitted to the jury in the first place. By allowing the case to go to the jury without a motion for a directed verdict, defendant conceded that the evidence was sufficient to meet the threshhold requirements of Section 31A-22-309(1)(a)(iii)and (v).

Without admitting that the jury was in any way justified in finding specials less that $6,305.37, by way of argument, had the jury found specials in excess of $3,000, could the defendant be heard to complain that there was insufficient evidence to justify that finding? Certainly not. In such a case, defendant would clearly have waived that argument. Why then can the defendant after the fact, claim that there is no evidence of permanent injury based upon objective findings? Furthermore, when defendant allowed the case to go to the jury without a specific instruction on permanent disability and without instructions on what constitutes objective findings, defendant waived any objection in that regard as surely as he waived any objection as to the amount of the plaintiff's medical expenses, had the jury found in excess of $3,000.

In a footnote on page 29 of defendant's brief, he claims to have made a motion for directed verdict and cites Tr. 364:308-09. This motion was made after the jury had returned its verdict and had been dismissed, and was not a motion for a directed verdict. The court directed that plaintiff make the motion in writing, and defendant thereafter filed his Motion for Entry of Judgment of "no cause of action based on the Jury's verdict." (R. 232) At Tr. 364:217-218 defendant did make a motion for directed verdict at the close of plaintiff's case on the alleged grounds that plaintiff had not proved that the medical expenses were "reasonable" which the court denied and which defendant thereafter abandoned.

B. PLAINTIFF PROPERLY MARSHALED ALL OF THE EVIDENCE ON THE ISSUE OF WHETHER PLAINTIFF'S INJURIES AND DISABILITY FROM

THE AUTOMOBILE COLLISION WERE PERMANENT OR JUST TEMPORARY.

At page 21 of his brief, defendant asserts that it is not clear whether plaintiff is challenging the verdict or the findings of Judge Quinn. In her Point 1, plaintiff asserts that the clear weight of the evidence is that plaintiff's injuries resulting from the automobile collision were permanent, and in Point 2 plaintiff asserts that the court erred in finding that plaintiff failed to prove permanent injuries based on objective findings. In Point 2 the court's findings are set forth verbatim. The marshaling done in Point 1 applies equally to Point 2 as both deal with the issue of permanent injury. Defendant's allegation that plaintiff failed to "enumerate" the findings to which the marshaling applies is therefore clearly without merit. It is equally clear that plaintiff is challenging both the findings of Judge Quinn and the verdict as both relate to the issue of permanent injuries resulting from the collision and both are contrary to the clear weight of the evidence.

VERDICT: The verdict is challenged primarily because plaintiff's injuries from the collision were by the clear weight of the evidence permanent and the verdict is clearly inadequate to compensate a person for severe permanent injury. "Permanent" means for a lifetime.

FINDINGS: The findings of Judge Quinn which although they were four in number findings really amounted to just two findings, to-wit: (1) that there is no objective test for myofacial pain and (2) therefore there can be no objective findings to support any determination of permanent injury.

It should first be noted that it is not required to marshal evidence if the findings are improper in the first place, which is the case here. As we point out hereafter, plaintiff did not request such findings, and they should not have been made in the first place. Furthermore they are in effect more conclusions of law than findings of fact. In such cases it is not necessary to marshal the evidence. In Woodward v. Fazzio, 823 P.2d 474 (Utah App. 1991) this court held with regard to findings which are "legally insufficient" [which we believe includes findings which are really conclusions of law or otherwise improper as a matter of law]:

> "There is, in effect, no need for an appellant to marshal the evidence when the findings are so inadequate that they cannot be meaningfully challenged as factual determinations. In other words, the way to attack findings which appear to be complete and which are sufficiently detailed is to marshal the supporting evidence and then demonstrate the evidence is inadequate to sustain such findings. But where the findings are not of that caliber, appellant need not go through a futile marshaling exercise. Rather, appellant can simply argue the legal insufficiency of the court's findings as framed."

Nevertheless, since it is plaintiff's position that the clear weight of the evidence in this case is that plaintiff's injuries from the collision were permanent not temporary, plaintiff as required, marshaled all evidence supporting the proposition that plaintiff did not sustain any permanent injury resulting from the collision, and defendant's claim that plaintiff has failed to marshal all such evidence is without merit. Based upon McNair v. Farris, 944 P.2d 392 (Utah App. 1997) it appears that the opinion of a physician is necessary to establish whether an injury is permanent or only temporary.

The evidence that must be marshaled therefor is the testimony of the expert witnesses on that issue. Plaintiff properly marshaled all of that testimony. On page 22 of his brief, defendant lists certain items which he claims plaintiff failed to marshal. None of the items there listed constitutes an opinion of a physician as to whether plaintiff's injuries from the automobile collision are permanent or just temporary. We respectfully submit that all evidence on the issue of permanent injury resulting from the collision has been properly marshaled. Defendant has listed certain circumstances, but they do not in and of themselves establish permanent injury or temporary injury. If they did, we would not need the opinion of a physician on that subject. Those circumstances which a physician identifies as supporting temporary or permanent have been marshaled along with that physicians testimony, records and reports. Items not so identified are not self proving one way or the other, and thus are not listed under one set of circumstances or the other.

This court has made it clear that the purpose of the rule is not to require a comprehensive review of all of the evidence. In Note 1 at page 728 in the case of Neely v. Bennett, 51 P.3d 724 (Utah App. 2002) this court stated:

> "Simply stated, we do not want an exhaustive review of all of the evidence presented at trial. Rather, we want a precisely focused summary of all of the evidence that supports any finding that is challenged on the ground that it is clearly erroneous."

The precise focus in this case is the evidence of the experts on the issue of permanent injury or disability resulting from the collision, because the testimony of an expert is necessary to establish permanency. Plaintiff has fairly and completed marshaled

that evidence. Having done that, Neely guides us to the next step which is outlined on page 727 of that opinion where the court quotes with approval from West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1325 (Utah App. 1991) as follows:

> "'After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence.'"

The fatal flaw in this case is the testimony of Dr. Chung on temporary injury which in reality is not testimony at all. As we have pointed out his testimony boils down to a statement that plaintiff's injuries are permanent or they are temporary. This amounts to no opinion, and leaves the testimony of Dr. Petron and Dr. Dall unopposed. Dr. Petron stated in his report (Pl. Ex. 2 last page) that plaintiff "...continues to be bothered with myofascial pain that I think will likely persist,." and stated that but for the automobile collision plaintiff would have recovered. He stated at Tr. 363:172 on cross examination by defendant's attorney:

> "Q You say that to a reasonable degree of medical probability that those symptoms would have gone away.
> A. I would expect that they would've gone away, because typically myofacial pain would go away."

In fact Dr. Chung stated on the last page of his supplemental report (Ex. C):

> "I would agree with the sentiments expressed by Dr. Petron and Dr. Dall in these records."

It is interesting to note that in the Neely case, the car that hit plaintiff was going 5 miles per hour with combined damage to both vehicles of $200, whereas in the present case, plaintiff was traveling 40 miles per hour when defendant pulled in front of

her, and her vehicle damage alone was approximately $2,000. Furthermore there was substantial evidence in Neely of malingering on the part of plaintiff, whereas no such issue exists in this case. Even Dr. Chung said:

> "I see no reason not to believe Ms. Marshall when she says she hurts, or that these areas are tender, or you know, that she saw the doctors that she saw and said what she said."

In Neely, plaintiff was asking for $100,000 damages and the jury awarded her $2,902 specials and $1,000 general damages. Notwithstanding the evidence of malingering, that small verdict was not taken from plaintiff in that case as the small verdict was in this case. Plaintiff has fairly met the requirements of the marshaling rule.

At page 24 of defendant's brief he cites Rees v. Intermountain Healthcare, Inc., 808 P.2d 1069 (Utah 1991) for the preposition that a jury verdict will be upheld where it is sustained by competent evidence. However, that holding must be interpreted in the light of another statement made in that case at page1079, where the court held:

> "On review, we will not disturb a jury's award of damages unless it is so irrational as to indicate passion, prejudice, disregard of competent evidence, consideration of improper factors, or misunderstanding."

That is exactly what plaintiff contends, that the jury disregarded the overwhelming evidence that plaintiff's injures resulting from the collision were permanent and were improperly influenced by Dr. Chung's meaningless opinion that plaintiff's injuries were permanent or temporary, or they were otherwise influenced by passion or prejudice.

C. FAILURE TO OBJECT TO DR. CHUNG'S TESTIMONY DOES NOT PRECLUDE PLAINTIFF FROM ARGUING THAT THE CLEAR WEIGHT OF THE EVIDENCE IS THAT PLAINTIFF'S INJURIES WERE PERMANENT.

Defendant argues that plaintiff is precluded from raising on appeal the issue of the deficiencies in the testimony of defendant's expert, Dr. Jeffrey Chung because plaintiff failed to object to his testimony at the trial. This contention might be correct, if plaintiff was arguing that the testimony of Dr. Chung should never have been heard by the jury in the first place. Plaintiff does not quarrel that Dr. Chung by reason of his education, training and background is qualified as an expert witness. Rather it is plaintiff's position that Dr. Chung's bias for his client led him into statements that are illogical and make no sense. His is a position that the jury should have disregarded. Dr. Chung's position is so weak that the clear weight of the evidence in contrary to the verdict of the jury. Rule 59 URCP is designed for just such a case. Rule 59 does not just apply in cases where evidence should have been excluded. Rule 59 is designed for cases where the evidence was properly admitted, but the clear weight of that properly admitted evidence is against the jury verdict. That is exactly the case here. Even if Dr. Chung's testimony was inadmissible as being a meaningless statement (i.e., that plaintiff's injuries and disability are permanent or temporary), the fact that such evidence was admitted, doesn't change the fact that it is meaningless. It is still nonsense and the clear weight of the evidence is that plaintiff's injures resulting from the collision were permanent.

D. DR. CHUNG'S REPORT DOES NOT SET FORTH HIS SO-CALLED

ALTERNATIVE THEORIES.

In plaintiff's original brief, she states that Dr. Chung's report mentions only his opinion that plaintiff's injuries are equally caused by the automobile collision and the two prior work injuries. Plaintiff points out that there is no mention in Dr. Chung's report (Ex. C) of an alterative theory that plaintiff's injuries were only temporary.

At page 27 of defendant's brief, defendant asserts that Dr. Chung didn't just come up with his temporary injury theory at trial, but rather that it was set forth in his report and in support defendants quotes this language from page 13 of the report:

> "Ms. Marshall most likely achieved medical stability following the accident on 9-18-98 on 12-17-98."

An opinion that plaintiff achieved medical stability isn't the same as saying her injuries were only temporary. Dr. Chung apparently equates "medical stability" with the term "maximum medical improvement" which is the term he uses in his oral testimony at Tr. 364: 240-1, and which he there defines as meaning nothing more than "It doesn't mean a person won't get better. It means that what a doctor does, or what a physical therapist does, won't make much difference." It thus seems to essentially have just the opposite meaning from that contended for by defendant. It seems to mean that whatever condition she has on December 17, 1998, unless nature intervenes. she will have to live with the rest of her life. That is certainly not the equivalent of temporary injury or disability.

We desire to point out another fatal flaw in Dr.Chung's temporary injury speculation or non-opinion. He seems to place great emphasis on the notion that the

record shows no doctor visits or physical therapy between December 17, 1998, until April 14, 1999. Dr. Chung maintained that lack of records of treatment during that period suggested to him that plaintiff had recovered from her injuries sustained in the automobile collision. He reached this conclusion although there was no testimony that her pain abated during that period of time, and in fact her pain continued and the lack of records was the result of the termination of plaintiff's existing insurance at that time. Plaintiff testified at Tr. 363:

"Q. Did you take any more of these trigger injections?
A. No.
Q. When you were getting treated by Dr. Petron, when did that stop after this accident?
A. That stopped with the in - when my insurance changed.
Q. And have you seen another doctor since Dr. Petron?
A. Dr. Joel Dall.
Q. What occasioned that? How did that happen?
A. I was hur - hurting, spasming.
Q. You had new insurance coverage?
A. New insurance.
Q. And they referred you to him?
A. To him, uh-huh (affirmative).
Q. And did you have eligibility through that for additional therapy?
A. Yes.
Q. And did you get such therapy?
A. Yes."

Defendant doesn't dispute in his brief the fact that Dr. Chung's opinion is an alternative, take your choice, proposition, and he cites no case law that holds that such an alternative opinion is proper in a personal injury action. The only law which he quotes to legitimize this view is Weber Basin Water Conservancy District vs. Skeen, 328 P.2d

730 (Utah 1938) an eminent domain case. He misconstrues the holding of that case. The three appraisal witnesses in that action gave opinions–firm opinions–of damages or value of the landowner's property: $45,000.00, $50,000.00 and $80,000.00 respectively. The appraisers did not give the jury alternatives or sliding scale evaluations or outside limit guidelines with an invitation to the jury to fill in the blanks, as Dr. Chung did in the case at bar. Had Chung stated an opinion that plaintiff's injuries were only temporary rather than a two-option invitation to speculation, then the jury consistent with the Weber Basin holding would have had a legitimate choice about which medical opinion on the issue of permanent vs. temporary to believe. That is not what happened in this action and Weber Basin is of no help to defendant.

POINT 2. THE COURT ERRED IN FINDING THAT PLAINTIFF FAILED TO PROVE PERMANENT INJURIES BASED ON OBJECTIVE FINDINGS.

A. PLAINTIFF DID NOT REQUEST FINDINGS BY THE COURT.

At page 3 defendant states that "she suggested that the trial court enter a finding of fact that Plaintiff had a "permanent impairment based upon objective finding." Again at page 28, defendants states that "At plaintiff's request, the judge did make additional findings of fact and those findings were unfavorable to Plaintiff." Defendant is in error in suggesting that plaintiff requested such findings. Plaintiff did just the opposite. Although plaintiff called Rule 49(a) to the court's attention, plaintiff did not request a finding from the court. At page 7 of the transcript of the argument on the motion for new trial, plaintiff argued:

> "On the other hand, we argued that where we allowed the case to go to the court [jury] on the instructions that we gave them, that becomes the law of th case, and that the parties have basically waived these affirmative [inaudible.]. Certainly the law is that in the absence of a motion for a directed verdict on the issue of permanent injury based on objective finding, the defendant can't argue there isn't sufficient evidence on that point and no such motion was made.
>
> "Now, the plaintiff got a favorable verdict and the defendant really cannot now argue that it's not supported as to all the issues."

Again in that said argument at page 19 plaintiff argued:

> "Both parties submitted it to the jury and they ought to live with that. That seems to me that's what that rule means [inaudible] court. The Court can, I suppose, made a finding. But we think that if the Court makes that finding it ought to be that [inaudible] so we'll submit it." (Emphasis added.)

B. PLAINTIFF WAS NOT REQUIRED TO ELICIT TESTIMONY FROM HER EXPERTS ON THE MEANING OF OBJECTIVE FINDINGS.

At page 30 of defendant's brief, defendant complains that plaintiff did not elicit testimony from her experts on the meaning of "objective findings." At page 8 and again at page 14, defendant refers to a statement by Dr. Petron in his report (last page of Pl. Ex. 2) where he stated that plaintiff:

> "...has not sustained any permanent disability as far as loss of range of motion or any objective impairment or disfigurement that we can see on MRI or X-ray..."

Plaintiff was not required to elicit such testimony. The definition of "objective findings" is for the court and is not for the experts to define as plaintiff points out in Point 2 of her original brief. Furthermore, when the parties submitted the case to the jury without an instruction on the matter of "objective findings" that issue was

waived, and the jury was only required to find whether defendant was negligent and whether such negligence was the proximate cause of plaintiff's injuries. Both of which the jury found.

As to Dr. Petron's statement, he did not say that plaintiff did not have any permanent disability. He only said that she had not sustained permanent disability as to 2 areas: "loss of range of motion" and "objective impairment or disfigurement." He expresses no opinion on permanent disability which is not manifested in loss of range of motion or impairment or disfigurement. Further, his opinion on the subject of impairment or disfigurement is limited to what can be seen on an MRI or X-ray. If the definition of "objective" is what a physician determines from his examination and not just from what the patient says, then it is clear that Dr. Petron did not understand the legal definition of "objective" and his opinion on this point is of no more value than that of Dr. Chung which we discuss in Point 2 of plaintiff's original brief (p. 39).

C. THE THRESHOLD REQUIREMENT OF SECTION 31A-22-309(a)(iii) UCA IS NOT LIMITED TO "IMPAIRMENT" BUT ALSO INCLUDES "DISABILITY."

At page 20 of defendant's brief, he states:

> "Finally, there was no testimony that Plaintiff had a permanent 'impairment'; she may have a permanent medical condition, but there was no testimony that her condition resulted in any type of impairment or impairment rating."

Apparently, defendant seeks to have this case turn on the meaning of the word "impairment." At Point II.b. (p. 25) of his brief, defendant claims that if plaintiff

doesn't meet the $3,000 threshold for medical expenses and then states: "The only remaining criteria was subsection iii (i.e. 'permanent impairment based upon objective finding')." Defendant then goes on to refer to "permanent impairment no less than 7 times in the reminder of the subsection, and numerous other times throughout his brief. What about "permanent disability?" Defendant stays away from that term. As noted above defendant seems to acknowledge that plaintiff has a permanent "condition," but defendant steers clear of the term permanent disability. This aversion to the term may be because in his findings Judge Quinn found only that plaintiff did not have a permanent "impairment." He did not find that plaintiff did not have a permanent "disability." Indeed it would appear that he could not so find.

Section 31A-22-309(1)(a)(iii) UCA is not limited to the word "impairment" (whatever that may be held to mean in this context), but is much more extensive. That section uses a much broader phrase: "permanent disability or permanent impairment based upon objective findings." (Emphasis added.) Defendant does not seem to assert that plaintiff doesn't have a "disability" as opposed to an "impairment." But however that may be, Section 31A-1-301 UCA provides definitions for some terms used in Title 31A, and subsection (45) thereof defines "disability" as follows:

"'Disability' means a physiological or psychological condition that partially or totally limits an individual's ability to:

(a) perform the duties of:

(I) that individual's occupation; or

(ii) any occupation for which the individual is reasonably suited by education, training, or experience; or

(b) perform two or more of the following basic activities of daily living:
(I) eating;
(ii) toileting;
(iii) transferring;
(iv) bathing; or
(v) dressing."

The undisputed evidence clearly shows that plaintiff has doctor-imposed lifting restrictions (20 lb. maximum). Plaintiff states in her testimony at Tr. 363 :62:

"Q. Are you under any restrictions about what you can or can't do?
A. Yes.
Q. What's the restriction?
A. Twenty pounds, no quadriplegics, no lifting at all. Nothing over 20 pounds.
Q. And when was that restriction imposed?
A. That restriction was imposed - it started with Dr. Petron when I went to him.
Q. Which time?
A. Let's see. That restriction was all the way - the '98 which I went into see him.
Q. The first time you went to see Dr. Petron?
A. Yes.
Q. Or Petron?
A. Petron.
Q. And have you since that restriction?
A. No. Still on it.
Q. And this - that's still enforced today?
A. Yes.
Q. So you don't lift anything more that 20 pounds?
A. No.

This is confirmed by Dr. Petron (Pl. Ex. 1 record for 5/17/00) where he states:

"Plan: I just went through a stretching and strengthening program with her. I would like her to continue with this regimen. I have put her on a work restriction of no lifting greater than 20 or 30 lbs and no repetitive lifting. She is to follow up to see me at this int just as needed."

This seems to be the first reference in Dr. Petron's records to a specific limitation on the amount plaintiff could lift, but there are numerous references in his records to plaintiff being on or being returned to "light duty" for example Dr. Petron's reports (plaintiff's Ex. 1) for 6/3/98, 8/24/98, 10/12/98, 10/19/98, 11/3/98 and 11/24/98.

Furthermore, plaintiff's constant pain severely limits her physical activity at work and at home. Dr. Chung himself stated at page 14 of his report (Ex. C):

> "Based upon the current available objective medical data, I believe it would be reasonable to assign the responsibility of the patient's current subjective symptoms of pain and discomfort which cause her to voluntarily restrict her physical activities equally between the accidents of 1-30-98, August 1998, and 9-18-98." (Emphasis added.)

POINT 3 . THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL BECAUSE OF INADEQUATE GENERAL DAMAGES.

A. THE ACTIONS OF THE JUDGE AND JURY IN THE LOWER COURT ARE NOT THE MEASURE OF WHETHER PLAINTIFF WAS AWARDED INADEQUATE DAMAGES GIVEN UNDER THE INFLUENCE OF PASSION OR PREJUDICE.

At page 23 of defendant's brief he asserts that "The verdict of a jury must stand unless 'the evidence so clearly preponderates in favor of the appellant that reasonable people would not differ on the outcome of the case,.'" citing E.A. Strout Western Realty v. W. C. Foy & Sons, 665 P.2d 1320 (Utah 1983). Defendant then goes on to argue that "Plaintiff cannot show that 'reasonable minds would not differ' on the outcome of the case because, in fact, at least 9 reasonable "minds" (i.e. the jury and the judge) concluded that her auto accident related injuries were temporary." Again at pages

20 and 37 of defendant's brief, defendant makes similar statements. The statement at page 37 for example is: "However, at least 9 reasonable people (i.e the judge and the jury) agreed that the damage award was fair and adequate."

Defendant errs in arguing that the jury and judge below are the reasonable people referred to in the rule. By whom were they adjudged to be reasonable? Are we to assume that just because 8 people are impaneled as a jury and just because a judge is sworn in by proper authority that they are by definition reasonable so that their actions cannot be questioned? If so then there would be no need for Rule 59(a)(5) or (6) and certainly no reason to make a motion for a new trial or appeal a denial of such a motion. The fact is juries sometimes act out of passion or prejudice, or they disregard or misapprehend the evidence or instructions of the court. The fact is also that trial judges sometimes err in reviewing such actions of the jury. Plaintiff believes that is exactly what happened in this case. Indeed the jury and the trial judge were not "reasonable" in this case, and that is the reason for this appeal, and it is the reason we have appeals and appellate courts. Plaintiff believes that the clear weight of the evidence is that plaintiff's injures from the collision were permanent, and that reasonable minds would not differ that a verdict of $2,200 in general damages is clearly inadequate to compensate for a lifetime of pain and suffering.

B. THE SMALL VERDICT DEMONSTRATES THAT THE JURY ACTED OUT OF PASSION OR PREJUDICE OR THAT THEY DISREGARDED OR MISCONCEIVED THE EVIDENCE OR THE INSTRUCTIONS.

Plaintiff contends that the small verdict demonstrates that the jury acted out of passion or prejudice or that they disregarded or misconceived the evidence or the court's instructions particularly with regard to the presence of permanent injury.

Defendant's position is that the jury awarded the small verdict because they were convinced that plaintiff's injuries were temporary. If plaintiff is correct that the clear weight of the evidence is to the contrary, then defendant's argument that the jury believed the injuries were temporary would seem to establish plaintiff's point that the jury misconceived the evidence.

Judge Quinn takes the matter one step further. He finds that because the verdict was so small, the jury must have thought plaintiff's injuries were temporary and not permanent even though they were not asked to and did not so find. Nevertheless, Judge Quinn goes on to make a finding that because the jury apparently thought the injuries were temporary, therefore, plaintiff did not meet the threshhold, and he throws out even the meager verdict the jury awarded.

Judge Quinn errs in this for the reason that the matter was submitted to the jury on the instructions given and they became the law of the case, and any issue of permanent injury based upon objective findings was waived. Furthermore, Judge Quinn's temporary injuries led to the low verdict theory is against the clear weight of the evidence which is that plaintiff's injuries from the collision were permanent and which further supports plaintiff's contention that the jury acted under the influence of passion or

prejudice.

It is certainly punishment enough to have a jury award such a paltry verdict. It is double punishment to use that same paltry verdict, to throw out the entire verdict. Even if we were to assume no impropriety on the part of the jury, the result in this case is inevitably that the jury has been mislead. They think that what they are doing is for real, and that what they award is what the plaintiff will get. It turns out that we in effect are saying to them that since you didn't give plaintiff enough, the plaintiff doesn't get anything. Somehow it is reminiscent of Justice Crockett's statement in his dissent in Brigham v. Moon Lake Electric, 24 Utah 2d 292, 470 P.2d 393, 398 (1970):

> "It is difficult for me to reconcile the principle of justice under the law with the concept that court procedure is like a machine which rolls so blindly and inexorably on that neither the trial court nor this court is able to rectify what impresses me as an obvious injustice. I say this because the effect of this decision is to take away from the plaintiff, a 10-year old boy, a spacial verdict in which the jury found he had suffered damages in the sum of $736.80 actual expenses (special damages) and $2500 general damages which I think it fair to assume that they intended and believed he was to receive."

It would also be fair to say that the jury in this case intended plaintiff to have and believed she would receive the amount of their verdict. Although plaintiff disagrees with the verdict and contends that it was given under the influence of passion or prejudice or that the jury misunderstood or overlooked the evidence, the instructions of the court or both, still plaintiff was entitled to the verdict in all events.

POINT 4. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL BECAUSE OF INADEQUATE

SPECIAL DAMAGES.

The jury award of $2,100 special damages was clearly inadequate and erroneous. Defendant in his brief admits that evidence of plaintiff's medical expenses in the amount of $6,305.37 was admitted without objection. He argues however that defendant did not stipulate that those expenses all resulted from the automobile collision. That is not the point however. The point is that there was no limitation placed upon that evidence, and it was therefore admitted without restriction, and plaintiff's exhibit 10 expressly stated at the top:

" ITEMIZATION OF BRENDA MARSHALL MEDICAL EXPENSES
AUTO COLLISION OF SEPTEMBER 18, 1998,
AS OF JANUARY 7, 2004"

The evidence of specials resulting from the collision in the sum of $6,305.37 is presented to the jury without objection, and yet the jury has been allowed without any basis in reason to arbitrarily pick the figure of $2,100 dollars without any basis for apportioning or segregating this amount from the total of $6,305.37. The result of this arbitrary action is that plaintiff is not only deprived of the specials she incurred and proved, but defendant attempts to deprive her of even this lesser amount claiming that it is below the threshhold. Defendant attempts to justify this inequity by claiming that the jury must have believed that the automobile collision was not responsible for any medical expenses after December 1998, and that the amount incurred between September 18, 1998, and December 1998 is approximately $1,932.00. If they did that they clearly misconceived the evidence, because

as plaintiff points out at page 46 of his original brief herein, even Dr. Chung's testimony (viewed in its best light) apportions 30% of plaintiff's problems to the automobile collision, and even assuming apportionment is proper 30% of the expenses incurred after December 1998 should be added to the $1,932.00 figure which amounts to another $1,258.89 (30% of $4, 196.30) which amounts to $3,190.89 and thus exceeds the threshold requirement of $3,000 by at least $190.89. If Dr. Chung inconsistency totally destroys his testimony as plaintiff contends, then of course, are left with the only testimony being that plaintiff's injuries from the collision are permanent, and the entire verdict is inadequate and plaintiff should be granted a new trial.

POINT 5. THE TRIAL COURT ERRED IN FAILING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTIONS NOS. 16, 15 AND 11

A. PLAINTIFF'S REQUESTED INSTRUCTION NO. 16 RELATING TO PLAINTIFF'S PROBABLE LIFE EXPECTANCY

Defendant's response to this point which was dealt with in Point 5. A. of plaintiff's initial brief, is apparently that if it was error it was not prejudicial. Plaintiff is seeking damages for a claimed lifetime of pain and suffering. The extent of her injuries and their severity are parts of that equation, but equally a part of the equation is the probable duration of the pain. Failure to give an instruction which goes directly to the probable duration of that pain is prejudicial on the face of it. It is no answer to this obvious and apparent prejudice to say that plaintiff's counsel in closing argument referred to a "lifetime of pain and suffering" when the jury was prohibited from knowing the duration

thereof for lack of said instruction. Furthermore, giving that instruction would have informed the jury that there was a basis in the law for awarding damages for plaintiff's lifetime. Without that instruction the jury is in effect invited to believe that plaintiff's counsel is stretching the point. If failure to give the instruction is not prejudicial in this case then it would not seem to be prejudicial in any case, and there would seem to no reason ever for the instruction in any case, but that is obviously not the law.

B. PLAINTIFF'S REQUESTED INSTRUCTION NO. 15 RELATING TO AGGRAVATION OF PREEXISTING INJURY

In opposition to this point, defendant appears to argue that MUJI 27.7 and MUJI 27.6 are after all essentially the same so no error in giving one rather than the other. This item was discussed in plaintiff's original brief in Point 5.B. plaintiff's requested instruction No. 16 is found in MUJI 27.7 and it basically says that if a preexisting condition isn't really a condition anymore (i.e., it is latent, dormant or asymptomatic) the person responsible for the injury that reactivates that condition is liable for the total condition.

On the other hand, the instruction actually given (MUJI 27.6) basically says that a plaintiff cannot recover for preexisting condition for only for the portion that can be said to be an aggravation. This is a substantial difference, and the two or by no means equivalents.

Plaintiff testified that she was recovered prior to the accident. She testified that she was "feeling fine" and had been released to go back to work two days before the collision. At Tr. 363:69 plaintiff testified:

"Q. And did you ever get released by Dr. Buzzard or Dr. Petron to go back to work?
A. I was. Dr. Petron released me just two days before the accident to go back to full duty, to give it a try."

Plaintiff testified at Tr. 363:74:

"Q. Now in terms of pain, how were you feeling as of that two days before the accident?
A. I was feeling good. I was feeling fine."

(This testimony following testimony that she had prior to that time only been doing light work in the office.)

Dr. Petron and physical therapist, Teresa Hall, substantiated that fact as plaintiff points out in said Point 5. B. (p. 49 of plaintiff's original brief.) Dr. Petron's stated with regard to his report of 9/10/98 (plaintiff's Ex. 1):

"Q. I just - a final question being, did you intend her to go back to full work activity as of that report: is that correct?
A. Correct."

Teresa Hall stated in her report (page 17 of plaintiff's Ex. 1):

"She was on light duty for work from a previous back injury and was released to return to full time when she was involved in this motor vehicle accident."

Defendant's response is an attempt to assemble evidence which he believes supports his theory that plaintiff had not fully recovered from her prior injuries at the time of the collision. That evidence is at best disputed. For example, defendant repeatedly refers to the filling of a prescription days before the accident without further evidence that plaintiff ever took those pills at or around the time of the accident, and this circumstance is

not evidence at all concerning the question of whether plaintiff was in pain immediately prior to the accident. Certainly this evidence does not neutralize as a matter of law the evidence cited above from plaintiff, Dr. Petron and physical therapist, Teresa Hall that plaintiff had recovered and was released to go back to work. The aforesaid evidence supports plaintiff's theory of the case, and it entitles her to the requested instruction because that instruction set forth plaintiff's theory of the case. When Judge Quinn refused to give that instruction he is in effect usurping the role of the jury and saying I don't believe she was fully recovered, so I don't have to give that instruction.

C. PLAINTIFF'S REQUESTED INSTRUCTION NO. 11 RELATING TO LEFT TURNS IN THE FACE OF ONCOMING TRAFFIC

This matter was treated in Point 5. C. of plaintiff's original brief. Defendant's argument in defense of the court's failure to give this instruction was his claim of page 43 of their brief "That evidence included the fact that Plaintiff was going 40 m.p.h. at a time when she should have been seen traffic in the other lanes slowing." That statement is not a "fact," but even if it were, there is no law that requires plaintiff to slow down just because traffic in another lane is slowing. Certainly defendant requested no such instruction. There was no evidence that plaintiff's speed (which was admittedly within the posted speed limit) was in any way a proximate cause of the collision. Where defendant by his own admission turned left suddenly in front of plaintiff (without ever seeing her approaching), whether plaintiff was going 40 miles per hour or somewhat less, would not have avoided the collision and is irrelevant. Furthermore, even if there were a basis for

defendant's said theory, it is only defendant's theory, and plaintiff was entitled to an instruction incorporating her theory, an integral part of which was that defendant was not entitled to make that sudden turn into plaintiff's lane just because traffic was slowing in one or more of the other oncoming lanes. Furthermore, defendant argued that plaintiff was negligent for not slowing down when traffic slowed in the lanes to her left. Failure to give that requested instruction allowed the jury to believe that defendant was justified in relying on that same slowing to turn in front of plaintiff, to determine that plaintiff (contrary to all of the evidence) was 10% responsible for the accident, and further may well have laid the foundation for the jury to reduce the damages awarded to plaintiff. The failure to give that instruction was clearly prejudicial.

Defendant also argues that the point was argued in closing by counsel for plaintiff. Whether that is so or not, without the instruction such argument loses much if not most of its weight. Said instruction embodied plaintiff's theory of the case, and failure to give it was prejudicial error.

CONCLUSION

For the foregoing reasons, plaintiff is entitled to the relief requested in the Conclusion of her initial brief herein.

Dated this 22 day of January, 2005.

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Mailed two copies of the within brief including addendum to Bruce C. Burt, attorney for defendant and appellee, at his address, 215 So. State, Suite 500, Salt Lake City, Utah 84111, postage prepaid, this 24 day of January, 2005 .

Attorney for Plaintiff and Appellant